IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 9730 of 2000
With
SPECIAL CIVIL APPLICATION No. 13249 of 2000
With
SPECIAL CIVIL APPLICATION No. 4461 of 2001

For Approval and Signature:
HONOURABLE MS. JUSTICE R.M.DOSHIT

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to civil judge ?

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RAJESHKUMAR JAIN & 3 - Petitioner(s)

Versus

GUJARAT STATE PUBLIC SERVICE COMMISSION & 3 - Respondent(s)

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Appearance :
MR KH BAXI for Petitioner(s) : 1,3 – 4.

Mr VASANT KAMLESH RAMNIKLAL :: Petitioner No. 2 : IN PERSON
MR SK PATEL for Respondent(s) : 1,
MS PARAUMI SHETH AGP for Respondent(s) : 2,
MR PARESH UPADHYAY for Respondent(s) : 3 - 4.
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CORAM : HONOURABLE MS. JUSTICE R.M.DOSHIT
Date : 31/08/2005

ORAL COMMON JUDGMENT

It is the usual apathy of the Government which has

led to this group of petitions. The controversy centres around the implementation of a particular examination rule which this Court had found “not happily worded”. The observation made by the Division Bench of this Court has not caught the attention of the Government or the Government has not thought it necessary to pay heed to the observations made by the Bench. The result is this group of petitions.

The petitioners in these three *writ* petitions are similarly situated and have identical challenge against the Select List dated 18th August, 2000 published by the Gujarat Public Service Commission [hereinafter referred to as, “**the Commission**”] for appointment to the posts of Executive Engineer and Deputy Executive Engineer in Gujarat Engineering Services [Class-I & Class-II].

By Advertisement dated 1st February, 1996, the Commission invited applications for combined competitive examination for appointment in Gujarat Engineering Services [Class-I & Class-II]. Pursuant to the said advertisement, the petitioners and others had applied for selection and appointment to the Gujarat Engineering Services [Class-I & Class-II]. All the petitioners

appeared for the competitive examination held by the Commission. Having passed the written test, the petitioners were called for interview. The petitioners, however, failed to secure minimum qualifying marks at the said interview. The petitioners were, therefore, none suited for selection to the posts in Gujarat Engineering Services [Class-I & Class-II]. Feeling aggrieved, the petitioners have preferred the present *writ* petitions.

Mr. Vasant, the petitioner no.2 in Special Civil Application No. 9730 of 2000, has appeared in person. He has submitted that the appointment to the Gujarat Engineering Services [Class-I & Class-II] is governed by the statutory rules framed by the Government in exercise of the power conferred by *proviso* to *Article* 309 of the Constitution of India. Rule 4 of the Examination Rules appended to the said Recruitment Rules empowers the Commission to hold combined competitive examination for selection and appointment to the posts in Gujarat Engineering Services [Class-I & Class-II]. Under Rule 4 of the said Examination Rules, Commission is empowered to fix the qualifying marks in any or all subjects and also for *viva voce*. In the selection procedure in question, the Commission gave written test of a total of 900 marks.

The Commission fixed different qualifying marks for different categories of candidates namely General category, Socially & Economically Backward Class category, Scheduled Caste, Scheduled Tribes and Physically handicapped. The candidates who secured qualifying marks in the written test were called for *viva voce* consisting of 125 marks. For *viva voce* also, the Commission fixed different qualifying marks for different categories of candidates. Only those of the candidates who had secured the qualifying marks at the *viva voce* were declared selected. The petitioners failed to secure the qualifying marks at the *viva voce*. They were, therefore, without reference to the marks obtained by them at the written test, not included in the merit list of successful candidates. Thus, the result of the written test has been undone and the selection is made on the result of the *viva voce* alone. The said selection procedure was discriminatory and calls for interference by this Court. Mr. Vasant has,in support of his contentions, relied upon the judgment in the matter of **L.V Ashara v. Gujarat Public Service Commission, Ahmedabad** [1985 (2) SLJ 83] and of the *Hon'ble* Supreme Court in the matters of **Praveen Singh v. State of Punjab & Ors**. [2000 SC 3299] and of this Court in the matter of

Barot Jignesh Lakshmansinh & Ors. State of Gujarat & Ors. [2003 (2) GLR 1727]. Learned advocate Mr. Bhairavia has, in addition, relied upon the judgment of the *Hon'ble* Supreme Court in the matter of **Inder Parkash Gupta vs. State of J&K & Ors**.[(2004) 6 SCC 786]. Both, Mr. Vasant and Mr. Bhairavia have submitted that since the decision in the matter of L.V Ashara [*Supra*], the Commission had followed a uniform selection procedure i.e. Selection was made on the basis of aggregate marks obtained by a candidate at the written test and *viva voce*. In other words, no qualifying mark was set for *viva voce*. A deviation is made for the first time after twenty years in the selection procedure under challenge. It is, therefore, submitted that the *principle of equality* also requires that same procedure be followed by the Commission which was hitherto followed by the Commission for the past twenty years.

The petition is contested by the Commission. Learned advocate Mr. Patel has appeared for the Commission. He has submitted that the Commission had conducted the competitive examination in accordance with the Examination Rules. Rule 4 of the Examination Rules expressly empowers the Commission to fix minimum

qualifying marks in the written test as well as in the *viva voce*. Accordingly, the selection was made on the basis of the aggregate marks obtained at the written test and at the *viva voce* by the candidates who had secured the minimum qualifying marks at the written test as well as in *viva voce.* In support of his contentions, Mr. Patel has relied upon the judgments of the Hon'ble Supreme Court in the matter of **State of U.P v. Rafiquiddin & Ors**. [AIR 1988 SC 162]; of **Jasvinder Singh & Ors. vs. State of J & K And Ors.** {2003 (2) SCC 132] and of this Court in the matter of **Barot Jignesh Lakshmansinh & Ors. v. State of Gujarat & Ors.** [2003 (2) GLR 1727].

In the matter of L.V Ashara [*Supra*], a similar selection made by the Commission for appointment to the posts in Gujarat Engineering Services [Class-I & Class-II] was under challenge. The gravamen of the grievance expressed by the concerned petitioners was against the minimum qualifying marks for *viva voce* fixed by the Commission. Considering Rule 4 of the aforesaid Examination Rules, the Division Bench of this Court observed that, "..**This rule though not happily worded, clearly empowers the Commission to prescribe qualifying marks, for written as well as *viva voce*. However, on**

plain reading of the rule, it is evident that whereas rule makes it obligatory on the Commission to prescribe qualifying marks for the written test, so far as viva voce test is concerned, it is left to the discretion of the Commission whether or not to prescribe qualifying marks." .."It no doubt confers power on the Commission to fix qualifying marks for viva voce test but it does so in a rather in-direct manner by saying `a candidate shall not be deemed to be qualified in the examination if he fails to obtain the qualifying marks fixed by the Commission." Having held that the Commission had power to fix the minimum qualifying standard for *viva voce* test, the Court recorded that the Commission had adopted qualifying standard of 45% at the written examination whereas for *viva voce*, the qualifying standard was 50 per cent. Thus, the standard adopted for *viva voce* test and personality test was found to be higher than the written test. The *Hon'ble* Court observed that, "**..we fail to see how the Commission could have fixed higher percentage of qualifying marks for viva voce and personality test." .."What was the object which was sought to be achieved in fixing 50 per cent marks as qualifying marks is not stated in the returns." .."In other words, we are completely in dark as to the object of fixing 50 per cent**

of the total marks as qualifying marks. Fixing of qualifying marks for viva voce test is not shown to have any nexus with the object of the examination. The Commission has fixed the qualifying marks arbitrarily without any rationale. We shall presently point out that this arbitrary fixation of qualifying marks has brought about startling results." Ultimately in the penultimate paragraph, the *Hon'ble* Court held that, "**..In the instant case as observed above, undue importance is given to the oral test. If the candidate is unable to obtain qualifying marks at the oral test, then notwithstanding his outstanding performance at the written test he would not be eligible to be included in the merit list. Thus, so much importance is given to the viva voce test that it effectively negates the result of the written test. In absence of any basis or rationale in adopting 50 per cent of the total marks as qualifying marks at the viva voce test, it is difficult to hold that the Commission had adopted fair and reasonable standard for making objective assessment for the qualities required of the candidate for being selected for the post in question**." In view of the observations made by the *Hon'ble* Court, the Commission was directed to revise the Select List by including the petitioners names in the merit list on the

basis of aggregate of marks in the written test as well as *viva voce* tests, ignoring the concept of the minimum qualifying marks of *viva voce* test. A great deal of reliance is placed on the above judgment. It is submitted that the said judgment was delivered in connection with selection for the same posts i.e. in Gujarat Engineering Services [Class-I & Class-II] under the same recruitment rules and the examination rules. It is vehemently argued that the aforesaid judgment was confirmed by the *Hon'ble* Supreme Court and the said judgment holds the field. Since the said judgment, the Commission had in all its selection procedures followed the aforesaid direction i.e. the selections were made on the basis of the aggregate marks obtained by the candidates at the written test and the *viva voce* test without disqualifying any of the candidates on the basis of marks obtained at the *viva voce* alone.

In the matter of Praveen Singh [*Supra*], the subject matter of challenge was the selection made for appointment to the post of Block Development & Panchayat Officer in the State of Punjab. The candidates were given a competitive written test of 350 marks. The qualifying standard in the said test was fixed at 33% in each paper

and 45% in aggregate. The candidates who had secured the aforesaid minimum qualifying marks were called for viva voce of 100 marks. The selection was made solely on the basis of the marks obtained in the *viva voce*. In other words, the written test was treated as a qualifying test for entering into viva voce test and the marks obtained at the written test had no bearing on the ultimate select list. The *Hon'ble* Court, considering the relevant rules held that, "..**Reading the two requirements as above, in our view question of having the written test written off in the matter of selection does not and cannot arise. Had it been the intent of the Service Commission then in that event question of there being a totality of marks would not have been included therein and together with specific marks for *viva voce* tests, would not have been there neither there would have any requirement of qualifying pass marks nor there would have any aggregate marks as noticed above.**" .."**Further, in the event, the interview was the sole criteria and the written test being treated as qualifying test, the Public Service Commission ought to have clearly stated that upon completion of the written elimination test, selection would be made on the basis of the *viva voce* test only..**" Consequently, the Public Service Commission was directed to complete the

process of selection in terms of the existing rules so that both the written and the *viva voce* tests be taken into consideration for the purpose of effecting appointments.

In the matter of Inder Parkash Gupta {*Supra*}, the subject matter of challenge was selection made by the Jammu & Kashmir Public Service Commission for appointment to the posts in Medical Education Service. For the said selection, the State Public Service Commission had assigned 100 marks for *viva voce* as against the 40 marks for other criteria. The *Hon'ble* Court found the said allotment of marks to be discriminatory and capable of being abused or misused. The *Hon'ble* Court held that, "..**It is true that for allocation of marks for *viva voce* test, no hard-and-fast rule of universal application which would meet the requirements of all cases can be laid down. However, when allocation of such marks is made with an intention which is capable of being abused or misused in its exercise, it is liable to be struck down as *ultra vires* Article 14 of the Constitution of India. "**

The relevant Rule-4 of the Competitive Examination reads as under :-

> "[4] The Commission shall fix what should be the qualifying marks in any or all the subjects of the examination and in the total either generally for all candidates or separately for candidates from the Scheduled Castes/Scheduled Tribes/Socially & Educationally backward class including Nomedic and Denotified Tribes in respect of vacancies reserved for such candidates and for other candidates, and a candidate shall not be deemed to have qualified in the examination if he fails to obtain the qualifying marks fixed by the Commission in the Viva-Voce and Personality Test."

It is apparent that the above Rule expressly empowers the Commission to fix a minimum qualifying standard for the written test as well as for *viva voce.* The above rule, as discussed by the Division Bench in the matter of L.V Ashara [*Supra*], though not happily worded, expressly empowers the Commission to provide for minimum qualifying standard in the written test as well as the *viva voce*. It is not in dispute that the Commission does have the power to fix a minimum qualifying standard for *viva-voce*. However, the challenge is to the fixation of minimum qualifying marks on the basis of the decision of the Bench in the matter of L.V Ashara [*Supra*]. It is contended that once the Bench had declared that the Commission ought not to have fixed the minimum qualifying standard for the *viva-voce;* the direction issued by the Bench having been followed for all these years, the Commission ought to have followed the said practice. In

deviating from the said practice, the Commission has acted in breach of *principles of natural justice* and fair play. The discriminatory action of the Commission has ousted the petitioners from the fray of the selected candidates, although the petitioners have secured considerably good marks at the written test and also in the aggregate of written test and *viva-voce* test. The discrimination meted to the petitioners is obvious. The petitioners need to be considered for selection on the basis of aggregate of marks obtained by them in the written test as well as the *viva-voce*; irrespective of their failure to obtain qualifying marks at the *viva-voce.*

I am afraid, that is not the ratio of the judgment of the Bench in the matter of L.V Ashara [*Supra*]. As recorded hereinabove what weighed with the Bench was higher qualifying standard set for *viva-voce* compared to the qualifying standard set for written test. Further, the Commission was unable to establish nexus or rationale in fixing 50% marks as qualifying standard at *viva-voce*. Though the Bench found that the selection made by the Commission was vulnerable, the Bench did accept that the Commission had power to fix the minimum qualifying

standard for *viva-voce* as well as for written test. In the present case, as stated in the counter affidavit, as against 900 marks allotted for the written test, 125 marks were allotted for *viva-voce* i.e. 12.5% of the total marks. For written test the qualifying standard set for different categories of candidates ranged from 48.66% to 15.22% as against the said qualifying standard set for the written test, the qualifying standard set for *viva voce* ranged from 28% to 12% for different categories of candidates. i.e. the qualifying standard fixed for the *viva voce* test was far less than the qualifying standard fixed for the written test. In absence of allegation of *mala fide,* the selection made by the Commission would not be *vitiated* only on the basis that the Commission fixed qualifying marks for the *viva voce*. The *Hon'ble* Supreme Court had, as far back as in the matter of **State of U.P vs. Rafiquaddin & Ors.** [AIR 1988 SC 162] upheld the action of the Uttar Pradesh Service Commission and held that, "..**Clause (2) of the proviso to Rule 19 did not no doubt expressly lay down that the minimum marks for the viva voce had to be prescribed but the language used therein clearly showed that the Commission alone had the power to prescribe minimum marks in viva voce test for judging the suitability of a candidate for the**

service. ..The Commission had therefore power to fix the norm and in the instant case it had fixed 35 per cent minimum marks for viva voce test. The viva voce test is a well-recognised method of judging the suitability of a candidate for appointment to public services and this method had almost universally been followed in making selection for appointment to public services. Where selection is made on the basis of written as well as viva voce test, the final result is determined on the basis of the aggregate marks. If any minimum marks either in the written test or in viva voce test are fixed to determine the suitability of a candidate the same has to be respected. Clause (ii) of the proviso to Rule 19 clearly confers power on the Commission to fix minimum marks for viva voce test for judging the suitability of a candidate for the service. We do not find any constitutional legal infirmity in the provision. ..Having regard to the nature and characteristics of a competitive examination it is not possible nor necessary to give notice to the candidates about the minimum marks which the Commission may determine for purpose of eliminating the unsuitable candidates. The rule of natural justice does not apply to a competitive examination."

In the present case, in the advertisement published by the Public Service Commission, a specific reference was made to the above referred Examination Rules. The candidates were also specifically notified that the Commission will fix the qualifying marks in any or all the subjects and in the *viva-voce* and personality tests. Thus, the candidates had been given adequate notice. Comparing the total marks with the marks allotted to the viva voce test, it cannot be said that the *viva voce* had been given undue importance so as to negate the result of the written test. In view of the above and in absence of *mala fide* or mischief in the selection procedure, the selection made by the Public Service Commission in consonance with the Recruitment Rules and the Examination Rules does not call for interference by this Court.

In view the above discussion, the petitions are dismissed. *Rule nisi* issued in each petition is discharged. The parties shall bear their own cost. The registry shall maintain copy of this judgment in each petition.

At this stage, Shri Vasant has submitted that in his petition, he has specifically alleged *mala fide* against

the Public Service Commission. He has submitted that considering the time ordinarily taken by the Commission in holding the written test, *viva-voce* test, preparation of the select list and in making recommendation to the State Government, in the present case, the Commission took inordinately long period in preparing the select list, and recommended the names of the selected candidates immediately, in haste. Thus, the conduct of the Commission itself proves *mala fide* intention of the Commission. He has further submitted that admittedly, the Commission fixed the qualifying standard for *viva voce* after the *viva-voce* was over. This conduct of the Commission proves that the minimum standard at the *viva voce* test was fixed after considering the results of the candidates with a view to eliminating certain candidates. The said allegation has been replied by the Commission in its affidavit dated 8th October, 2002. It is specifically stated that the minimum qualifying standard was fixed by the Commission and not by the Interviewing Committee and that too after the *viva-voce* was over, with a view to eliminating any possibility of manipulation at the *viva voce*. I see no substance in the allegation of *mala fide* made by the petitioner Shri Vasant. The time consumed by the Commission in preparation of the select list and in

forwarding names of the selected candidates in itself does not indicate lack of *bona fide* on the part of the Commission. Further, there is no reason why the Commission should fix a minimum qualifying standard with a view to eliminating certain candidates. The allegation of *mala fide* made by Mr. Vasant does not require further deliberation.

{Miss R.M Doshit, J.}

*Prakash**